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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re T.V. et al., Persons Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

Doreen E.,

Defendant and Appellant.

D055144

(Super. Ct. No. J515656C-D)

APPEAL from orders of the Superior Court of San Diego County, Yvonne E. Campos, Judge. Reversed and remanded.

Doreen E. appeals from the juvenile court's orders returning her children, T.V. and A.F., to her custody but also requiring her to arrange monthly visitation between the children and their maternal grandmother and great-grandmother. She contends that the orders violate her substantive due process right to make decisions concerning the care, custody and control of her children. (See *Troxel v. Granville* (2000) 530 U.S. 57, 66 (plur. opn. of O'Connor, J.); see generally *Herbst v. Swan* (2002) 102 Cal.App.4th 813, 816-820 and cases cited therein.) While not conceding the point in its entirety, the San

Diego County Health and Human Services Agency (the Agency) agrees that the court failed to apply the statutory presumption against ordering visitation over a custodial parent's objection and that the orders should be reversed and the matters remanded. We agree and reverse the orders on that basis.

### FACTUAL AND PROCEDURAL BACKGROUND

In December 2004 the Agency filed juvenile dependency petitions on behalf of four-year-old T.V. and two-year-old A.F. (the children), alleging that Doreen frequently left them alone, the family home was filthy and unsanitary and they had been exposed to a violent confrontation between Doreen and her boyfriend (A.F.'s father). The children were originally detained at the Polinsky Center, although they were later placed in the home of their maternal grandmother. The juvenile court ultimately granted the maternal grandmother de facto parent status, terminated reunification services and set a permanency planning hearing for the children.

Pending the permanency planning hearing, Doreen filed a section 388 petition seeking to have the children returned to her care and to have the court order six months of family maintenance services. The court denied her petition and subsequently terminated her parental rights and ordered adoption as the children's permanent plan. The maternal grandmother thereafter refused to allow Doreen or her other children to visit T.V. or A.F.

Doreen appealed the denial of her section 388 and the court's permanency planning orders and this court reversed all of those orders. (*In re Tatiana V.* (March 18, 2008, D051007) [nonpub. opn.].) On remand, the court reinstated parental rights to the children and, after a transition period, the children were returned to Doreen's custody. Doreen and the maternal grandmother agreed that the children would phone the maternal grandmother three times a week and the court issued an order requiring the calls.

Doreen requested that the court terminate the maternal grandmother's de facto parent status, a request that all parties other than the maternal grandmother supported, based in part on the acrimonious nature of the relationship between the two women. Although the court recognized the level of conflict between Doreen and the maternal grandmother and the difficulties it was creating for the children, the court denied Doreen's request. Doreen appealed and this court again reversed. (*In re Tatiana V.* (June 2, 2009, D053584) [nonpub. opn.].)<sup>1</sup>

At a review hearing in May 2009, the court ordered that, in addition to the three calls a week, Doreen also had to facilitate a minimum of one monthly visitation with the maternal grandmother and great-grandmother, over the objection of both Doreen and T.V.'s father, and notwithstanding the evidence that Doreen had been arranging visitation between the children and the maternal grandmother and was willing to continue to do so. The court thereafter terminated its jurisdiction over the children. Doreen again appeals from the orders mandating visitation.

## DISCUSSION

The juvenile court ordered familial visitation pursuant to Family Code section 3104, which provides that a court may grant reasonable visitation between a child and his or her grandparent if (1) there is a preexisting relationship between the grandparent and the grandchild that is engendered by such a bond that such visitation is in the child's best interests and (2) it determines that doing so is appropriate after balancing the child's interests in visitation against the rights of a parent to exercise his or her parental authority over the child. (Fam. Code, § 3104, subd. (a).) The statute also creates a rebuttable presumption that such visitation is not in the best interests of the child if the parent who

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<sup>1</sup> We grant Doreen's request for judicial notice of this opinion.

has custody of the child, or with whom the child resides, objects to it. (Fam. Code, § 3104, subd. (f).)

The California Supreme Court has upheld the constitutionality of this statutory presumption. (*In re Marriage of Harris* (2004) 34 Cal.4th 210, 223-229.) Here, however, the Agency concedes that the juvenile court failed to apply it and argues that the matter must be remanded for further proceedings. We agree.

#### DISPOSITION

The orders relating to visitation and the termination of jurisdiction are reversed and the matter is remanded to the juvenile court for additional proceedings.

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NARES, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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AARON, J.